Elements of Land Use Law

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There are **three aspects of land use law**: planning, zoning and subdivision.

A. Planning.

The first aspect of land use law is planning, which means the law regarding planning boards and for growth policies, both of which are found in Title 76, Chapter 1, Montana Code Annotated.

The law about growth policies is found at §76-1-601, *et seq.,* MCA. First the Planning Board develops a growth policy, either on its own or with the help of a consultant, taking into consideration the elements in §76-1-601, MCA. Then the Planning Board holds a hearing following the notice procedure found in §76-1-602, MCA, and adopts a resolution in accordance with §76-1-603, MCA.

After the Planning Board makes its recommendation to the governing body, by resolution, the governing body then adopts a resolution of intention to adopt, adopt with revisions or reject the growth policy in accordance with §76-1-604(1), MCA.

Section 76-1-601(3), MCA, lists what a growth policy **must** include, but subsection (2) states the extent to which a growth policy addresses the elements in subsection (3) is at the full **discretion** of the governing body.

Of interest to this conference are the elements in subsection (3)(e) which include:

> A strategy for development, maintenance and replacement of public infrastructure, including drinking water systems, wastewater treatment facilities, sewer systems . . .

Subsection (4) of 76-1-601 lists the elements which **may** be addressed in a growth policy. Subsection (4)(c) was added in 2007 by Senate Bill 201. That bill encourages infrastructure plans which address future growth of a jurisdiction, and the public facilities addressed by the bill and the statute include drinking water treatment and distribution facilities, sewer systems and wastewater treatment facilities.

If a jurisdiction adopts an infrastructure plan and zoning to go along with it, there are benefits for proposed subdivisions in that area.

B. Zoning

The second aspect of land use law is zoning and there are three types:

1. Part 1, 101 or voluntary, petitioned county zoning

This county zoning law is found in §76-2-101, *et seq.*, MCA. It is antiquated and difficult to understand and interpret. Procedures vary from county to county. Basically freeholders (landowners) in an area decide they want to be zoned, they designate the boundaries of the area of the zoning district, they provide some suggestions for what the zoning regulations will say and they collect signatures from the people who own land in the proposed district.

Once the petitioners believe they have signatures from at least 60% of the freeholders in the district, they take the petition to the Clerk and Recorder who has to determine how many total

freeholders there are in the district, how many have petitioned to create the zoning district and then certifies the signatures and the percentage to the County Commissioners.

If the petition contains the signatures of at least 60% of the freeholders, the Board of County Commissioners should hold a properly noticed hearing, determine whether the requisite number of freeholders have signed the petition and create the district, provided the Commissioners are able to make the finding that the district is in the public interest or convenience. If the Commissioners do create the district, at the same time they either appoint a planning and zoning commission in accordance with §76-2-102, MCA, or assign the district to an existing planning and zoning commission.

Section 76-2-101(5), MCA, allows a protest. Counting the freeholders to determine whether 60% have signed a petition in favor of the zoning district is completely different from counting the protests to determine whether 50% of the titled property ownership is protesting.

A growth policy is **not required** for petitioned zoning.

2. Part 2, 201 or County Zoning

Petitioned zoning has been around since 1953. The law has allowed county zoning, found in Part 2, beginning at §76-2-201, MCA, since 1963 but very few counties have adopted this kind of zoning--yet. The procedure set forth in §76-2-201, *et seq.*, MCA, is much easier to follow than that set forth in Part 1 zoning.

Zoning used to be unpopular. Now it is in the minds and on the lips of people in many places. In fact, over the next few years we will see a desire on the part of many interests to move toward zoning, to regulate land use, and away from subdivision regulations, which have historically been the tool to regulate land use.

A growth policy **must** be adopted before a county may enact county zoning. §76-2-203 (1) (a), MCA.

3. Municipal zoning

Municipal zoning is found at §76-2-301, *et seq.*, MCA. Municipal zoning has been in existence since at least the 1920's and its constitutionality was affirmed by the United States Supreme Court in *The Village of Euclid, Ohio v. Ambler Realty Co*. (1926) 272 U.S. 365. Because zoning has been authorized in the law for municipalities in Montana since 1929, that concept is accepted in those jurisdictional areas and is well-developed.

A growth policy **must** be adopted before a municipality may zone. §76-2-304 (1)(a), MCA.

4. Interim zoning

Both Part 2 (County Zoning) and Part 3 (Municipal Zoning) allow for temporary zoning. It is authorized in §§76-2-206 and 76-2-306, MCA, in an emergency, for counties, and as an urgency measure for municipalities.

5. Zoning and water

Although there was an attempt in the 2007 legislative session to modernize the criteria for zoning regulations, that attempt failed. The criteria for county zoning is found in §76-2-203, MCA. The criteria for municipal zoning is found in §76-2-304, MCA. In both sections there is a subsection which says zoning is designed to "facilitate the adequate provision of . . . water, sewerage . . . and other public requirements."

A reasonable conclusion is that there is zoning enabling legislation which allows not only the provision of water but also the protection of water through the "provision of sewerage." The two are inextricably intertwined.

C. Subdivision law

The third aspect of land use law is that regulating subdivisions.

1. The Montana Subdivision and Platting Act (MSPA).

The Montana Subdivision and Platting Act ("Subdivision Act") is found at §76-3-101, *et seq.*, MCA. It was enacted in 1973 and has been amended in almost every legislative session. This is the land use law with which most people are familiar.

The law requires all counties to have subdivision regulations and those regulations should be updated after each legislative session--especially after the 2005 legislative session when substantial procedural changes were made to the subdivision law. Model Subdivision Regulations were developed after the 2005 legislative session and are posted on

the MACo and MAP websites. The Community Technical Assistance Program (CTAP) at the Department of Commerce is working on a more current update.

If a proposed division of land is not exempt from subdivision review (the exemptions are found in Part 2 of the Subdivision Act) and it involves parcels of land less than 160 acres in size, it will be reviewed as either a minor subdivision (which contains five or fewer lots) or as a major subdivision (which contains more than five lots).

The Subdivision Act contains six parts—Part 1 contains general provisions—the purpose, definitions and remedies for violations. Part 2 contains exemptions. Part 3 is entitled "Land Transfers" and is an amalgam of provisions. Part 4 contains surveying provisions. Part 5 contains provisions relating to local subdivision regulations. Part 6 relates to the local review procedure and also contains §76-3-625, MCA, which is the provision enacted in 1995 that allows suits and appeals of subdivision decisions.

The purpose of the Subdivision Act is to divide land, but over the decades it has evolved into more than that because of the provisions found in Part 5 and Part 6.

Part 5 lists, in **§76-3-504, MCA,** the minimum contents of subdivision regulations. Included in that section are:

- **(1)(b)** the environmental assessment [§76-3-603 lists the requirements for the environmental assessment and, for a major subdivision, there must be a description of every body or stream of surface water that may be affected by

the proposed subdivision together with available ground water information, as well as a community impact report containing a statement of anticipated needs of the proposed subdivision for water and sewage];

- **(1)(f)** a prohibition of subdivisions for building purposes in areas located within the floodway of a flood of 100-year frequency, or determined to be subject to flooding by the governing body;
- **(1)(g)(iii)** subject to the provisions of 76-3-511, water supply and sewage standards . . . that meet either the regulations adopted by DEQ for parcels less than 20 acres in size or standards in 76-3-604 and 76-3-622 for parcels more than 20 acres in size;
- **(1)(j)** addresses water rights; and
- **(1)(k) and (l)** addresses ditch easements.

Perhaps the most misunderstood section in Part 5 is **§76-3-511, MCA.** This code section should **only** apply to water and septic regulations when it states "a governing body may not adopt a regulation under 76-3-501 or 76-3-504(1)(f)(iii) [sic] that is more stringent than the comparable state regulations or guidelines that address the same circumstances."

An examination of the language in Section 5 of Chapter 471 in 1995 clearly indicates the changes made by the bill are those issues addressed by DEQ and the Board of Environmental Review. Hopefully legislation in 2009 will make the cross-reference to 76-3-501 specific to subsection (7) and correct the cross-reference in 76-3-504 to subsection (1)(g).

The discussion draft LC 5004 for the Water Policy Interim Committee utilizes §76-3-511, MCA, as a vehicle for governing bodies to adopt regulations to encourage community water and septic systems. The trouble is, the procedure in that code section is so complicated most counties will not use that authority.

Part 6 of the Subdivision Act addresses the contents of the environmental assessment in §76-3-603, MCA, as previously discussed.

In 2005 Senate Bill 290 addressed water and sanitation issues which had arisen through litigation. Provisions from that bill are scattered throughout Part 6:

- **76-3-622** was a new code section in 2005. It contains the majority of Senate Bill 290 and is designed to require information about water and septic from the subdivider that the public or a hydrologist can evaluate and testify about at a hearing on the subdivision;
- **76-3-504(1)(g)(iii)** was amended to address both parcels less than 20 acres in size and parcels more than 20 acres in size;
- **76-3-601(1)** requires the 76-3-622 information be submitted with the preliminary plat;
- **76-3-604(6)(a) and (b)** which address the public comment submitted on the 76-3-622 information;
- **76-3-604(7)(a)** which codifies a previously used procedure criticized by the Attorney General;

- **76-3-604(7)(b)** which adds authority to address water and septic for lots 20 acres or greater;
- **76-3-608(7)** which provides a governing body may use the 76-3-622 information for a conditional approval or denial only if it is based on existing subdivision, zoning or other regulations that the governing body has the authority to enforce.

Section 76-3-608, MCA, provides the criteria for local government review. During that review the governing body must issue written findings of fact that weigh what is known as the "primary criteria" found in subsection (3). Water and septic considerations may be found in the impacts on agricultural water user facilities, the natural environment and public health and safety.

The law provides, in subsection (4) that the governing body may require the subdivider to design the proposed subdivision to reasonably minimize potentially significant adverse impacts. Subsection (5)(a) states a governing body may not unreasonably restrict a landowner's ability to develop land but recognizes that unmitigated impacts of a proposed development may be unacceptable and will preclude approval of the subdivision. Subsection (5)(b) goes on to say any mitigation requires consultation with the subdivider and consideration of the expressed preference of the subdivider.

As previously stated, §76-3-625, MCA, allows suits and appeals. Since that code section was enacted in 1995, many suits have been filed. An order in a district court case,

Neighbors Over the Aquifer, et al. v. Board of County Commissioners of Flathead County, DV-05-179, has given counties and subdividers pause, because the judge found the environmental assessment inadequate and voided the conditional approval of a subdivision. Even though this is a district court case, the message to subdividers is: take environmental assessment requirements seriously; and the message to governing bodies is: make sure your local requirements for environmental assessments are satisfied.

2. Water and Septic and the MSPA

a. Municipalities

The author does not represent cities, but assumes most of them have municipal systems.

b. Counties

i. Water

One would think a county could deny a subdivision if it didn't have adequate water, but this is not necessarily the case as the Department of Environmental Quality (DEQ) allows cisterns for individual lots, and water to be hauled.

ii. §76-3-604(7), MCA

This code section was added by Senate Bill 290 in 2005. It allows the governing body to defer to DEQ for lots less than 20 acres in size; and for lots 20 acres or more in size, the governing body may condition approval of the final plat upon the

subdivider demonstrating that there is an adequate water source (could be a cistern) and at least one area for a septic system and a replacement drainfield for each lot.

iii. Denial of a subdivision based on water or septic

Because the Supreme Court has ruled, in *Fielder, et al. v. Board of County Commissioners of Sanders County*, 337 Mont. 256, 162 P.3d 67, 2007 MT 118, that the "preliminary plat stage" mentioned in 49 Op. Att'y Gen. No. 7 (2001) extends to final plat, it is arguable that county commissioners could refuse to sign the final plat until the subdivider either obtains DEQ approval or complies with §76-3-604(7), MCA.

iv. Community Water and Septic Systems

Arguably a county could require these systems if it complied with the procedure set forth in §76-3-511, MCA. That is the code section that allows a governing body to adopt a regulation more stringent that comparable state regulations or guidelines that address the same circumstances. The procedure is to have a public hearing and take public comment. Evidence needs to be provided that the proposed standard or requirement protects the public health or the environment; and that the standard or requirement can mitigate the harm to

public health or the environment and is achievable under current technology. In addition the finding by the governing body :

- must reference information and peer-reviewed scientific studies in the record that form the basis of the governing body's conclusion, and
- must include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed local standard or requirement.

v. Conclusion

Rather than making it easier for counties to require community systems, the existing law makes it difficult, if not impossible. Furthermore, without a state-wide hydrological study the science does not exist to justify requiring these systems.

3. The Sanitation in Subdivisions Act

A chapter in Title 76 which is important to sanitarians and to the Department of Environmental Quality is found at § 76-4-101, *et seq.*, MCA. This area of the law is important to protect public health and safety when land is divided.